No. 10169

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FOX WEST COAST AGENCY, a corporation

Appellant,

vs.

JEAN L. FORSYTHE

Appellee.

BRIEF FOR APPELLEE, JEAN L. FORSYTHE

ROSECRANS & EMME and
BAYARD R. ROUNTREE,
815 Black Building, Los Angeles,
Attorneys for Appellee.

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TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

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Review of Appellant's Brief

Appellant's opening brief sets forth seven specifications of error, which are not followed in sequence in the argument.

Specifications 3, 4, and 5 are argued under one heading in the first point set out in the argument, then specifications 1 and 2 are discussed separately and in order, and finally specifications 6 and 7 are treated under one heading.

In this brief we will discuss the specifications of error and the argument with reference thereto in the same order appellant has adopted in that part of the opening brief devoted to the argument. However, some comment should first be made with reference to the statement of the case set out on page 6 of the brief.

In the opening portion of this statement, it is implied but not said, that the Fox West Coast Theaters Corporation and the United Artists Theater Circuit Inc., doing business as Fox U.A. Venture, were operating the theater. Throughout the brief this name "Fox U.A. Venture" is emphasized. Actually appellant corporation was operating the theater as agent for the Fox West Coast Theater corporation and the United Artists Theaters Circuit, Inc., the name Fox U.A. Venture being merely a bookkeeping device which we will show conclusively in the argument.

The appellant was in full control of the employees working in the theater and paid them from a bank account resulting from the income of the theater and its disposition was controlled by written contract between the three named corporations, as well as certain others, which contract was introduced in evidence as plaintiff's Exhibit No. 5, a full copy of which is set forth as an appendix to the opening brief.

I.

The Evidence Is Sufficient to Support the Findings and the Judgment

1. As to the Relations Between the Parties

Appellant states that the only evidence with reference to the relation of the parties, other than certain testimony to which objection was made, was the written contract introduced as plaintiff's Exhibit No. 5, and then endeavors in the argument to show this was insufficient.

Before discussing this contract it should be pointed out that appellant made no attempt whatsoever to prove that this contract had been modified or abrogated by the parties, or that appellant had been discharged or absolved of its duties thereunder.

In view of these circumstances it is submitted that the contract is conclusive proof that appellant was actually operating the theater and in full control thereof, and consequently responsible for any negligence arising from such operation. First, it is not questioned that the Fox West Coast Theatres Corporation and the United Artists Theatre Circuit, Inc., were the principal and interested parties in this theater and entitled to the proceeds from its operation, or to control the operation of the theater at the time the contract was executed. Let us then examine the contract in detail insofar as appellant's rights and duties or the manner of the operation of the theater are concerned. We are not particularly concerned with the opening recitals of the agreement which set forth the interest of the various parties signatory thereto. In the very opening of the first numbered paragraph of the agreement we find this language:

> "Grauman's Greater Hollywood, United West Coast, Los Angeles United Artists and United Ar-

> tists, and West Coast, respectively, *hereby surrender to and vest in Agency* the management of the * * * United Artists Downtown * * * . All furniture, fixtures, equipment and personal property located in the theatres and used or useful in the operation thereof, shall remain in the theatres subject to the control of Agency." [Appendix. p. 3, Tr. p. 21.] (Emphasis ours.)

It might be noted that in the recitals of the agreement, it is stated that the appellant corporation will be thereinafter designated as "Agency." Other duties and responsibilities of appellant are then set out and briefly stated are:

(1) To manage and operate the theater;

(2) The sole right as agent to select and contract for moving pictures;

(3) To employ the personnel of the theater;

(4) To keep all books of account;

(5) To collect, deposit and distribute the funds;

(6) To change the operating policies to include stage shows, etc., first obtaining written consent;

(7) Sole right, authority, and obligation in the event of such change of policy, to select book, etc., such stage shows or other attractions;

(8) Right to close and thereafter re-open the theater with the written consent of the parties.

Paragraph 2 provides that the appellant should receive five and one-quarter per cent (5¼%) of the gross income of the theater for its services. [Tr. p. 22.]

Paragraph 3 provides the method of handling all funds resulting from the operation of the United Artists and the other theaters involved, providing that such income should be deposited in a separate bank account and held in trust by the agency. Appellant was authorized and obligated to disburse such funds in the trust account as follows: [Tr. p. 23.]

(1) To pay to itself 5¼% of the gross income payable weekly;

(2) Rentals;

(3) All operating expenses, including, among other things, salaries of persons employed in the operation of the theaters, social security taxes, and minor repairs.

(4) Expenditures deemed by appellant, in its sole discretion, necessary in the operation of the theatres, or any one of them, other than operating expenses; providing that such expenditures should not exceed the sum of $1000 during any six months' period, without the written consent of the Fox West Coast Theater Corporation, and the United Artists Theater Circuit Inc., and finally the balance to be divided equally between the two principal corporations.

Paragraph 4 [Tr. p. 27] has no bearing on the present question.

Paragraph 5 [Tr. p. 28] provides that the Operating Account is to be commenced with a deposit of $25,000.00 contributed to in equal amounts by the principal corporations and that in the event it fell below said sum they should contribute equally a sufficient amount to bring the fund up to the initial amount.

In Paragraph 6 [Tr. p. 29] it is provided that appellant be required to maintain public liability insurance;

Paragraph 7 [Tr. p. 30] deals with the distribution of funds upon the termination;

Paragraph 8 [Tr. p. 31] the term of the agreement to be from April 1, 1937 to March 31, 1947.

Paragraph 9 [Tr. p. 31] it is provided that Agency may assign its rights, etc., to any corporation subsidiary to the Fox West Coast Theatres Corporation;

Paragraph 10 [Tr. p. 32] the effect on the agreement in the event the theater should be destroyed or damaged by fire, etc.

Paragraph 11 [Tr. p. 32] provides that appellant should render to the principal corporations daily statements of box office receipts, weekly statements of receipts, disbursements and expenses, annual profit and loss statements, and such other information as might be requested. The balance of the contract having no bearing upon any question involved in this litigation, we will not take the space to analyze the same.

The only attempt to show that any different situation was in effect at the time of the accident, other than that described in the contract, related to the question of the payment of the employees and this evidence established that the employees were paid from a bank account known as "The United Artists Contingent Fund."

Mr. Bertero testified: [Tr. pp. 78, 79]

> "After the 5.25 per cent of the gross income of the United Artists Theater at 933 South Broadway was deducted, and the payment of salaries of employees in that theater, including the manager of that

theater, were deducted, the balance of that money went into a separate bank account, and ultimately what we call distributions of the Venture were distributed to the two parties to the Venture; that is, the Fox West Coast Theatres Corporation and the United Artists Theatre Circuit, Inc."

Mr. Henry L. Wallace, Asst. Manager of the United Artists Theater, testified: [Tr. p. 110].

"Q. By Mr. Gallagher: Do that. A. I received my check at a certain time in the week from the United Artists Theatre, and that is the only check I ever received as long as I worked at the United Artists Theatre.

Q. That is, you received checks which were signed 'United Artists Theatre, Contingent Fund, by ————————'. A. By the management.

Q. Two names? A. Two signatures, Tom Sorerio and Jordan Sergeant.

Q. Did you sign any checks yourself? A. No, sir.

Q. By the Court: Who employed you? A. By the management; Tom Sorerio.

Q. The manager of what? A. Of the United Artists Theatre."

Payroll records and social security records were produced to show that such records were kept under the name "Fox U.A. Venture" and it is upon this evidence that great stress is made to establish that the people working in the theater were not under the control of appellant.

Mr. Bertero testified on this question, first: that the name "Fox U.A. Venture" was a bookkeeping title set up to economically describe the arrangement so far as accounting and other methods were concerned under plaintiff's exhibit 5. (The contract hereinbefore analyzed) [Tr. p. 78]. The managers were appointed by Mr. Skouras, President of the Fox West Coast Agency Corporation, and also President of the Fox West Coast Theater Corporation. Mr. Bertero testified further that the proceeds from the theater were deposited in the account known as the United Artists Theater Contingent Fund [Tr. p. 88], and from this fund certain expenses are paid by the theater manager. The balance remaining is transferred to an account entitled "Fox U.A. Venture Fund" in the Washington and Vermont Branch of the Bank of America. Certain other expenses are paid out of that account and at certain periods distributions are made to the Fox West Coast Agency and the Fox West Coast Theater and United Artists Theater Circuit, Inc. [Tr. p. 89].

From the foregoing it clearly appears that this method of keeping the payroll records of employees and handling the disposition of funds was strictly in compliance with paragraph 3 of the contract. No evidence was offered whatsoever to show that the employees were not, in fact, under the direct control of Appellant.

It must now appear that the effort of Appellant to place responsibility on the so-called Fox U. A. Venture is nothing more or less than an effort to confuse the issue when in fact Appellant is solely responsible for the operation of the theater.

2. The Evidence Supports the Finding of the Payment By Plaintiff of an Admission Fee to Appellant.

In our preceding argument we demonstrated that appellant was in fact operating the theater on March 24, 1940. Consequently there can be no question concerning the fact that plaintiff did pay the price of the ticket to the appellant. Moreover, appellant received 5¼% of the sum so paid by plaintiff. We submit that there is no merit in appellant's fourth specification of error.

3. The Finding of Negligence on the Part of Appellant is Supported by the Evidence.

It appearing without contradiction as we have previously shown, that appellant was in sole and complete control of the theater and the equipment thereof, it follows that plaintiff was entitled to the benefit of the doctrine of *res ipsa loquitur,* if that doctrine is otherwise applicable. That it is applicable does not seem open to argument as certainly theater seats do not ordinarily collapse when put to their intended use. Upon the trial appellant offered evidence in an endeavor to show that the collapse of the seat was not the result of negligence on its part. However, they failed in their endeavor for the evidence actually tended to show negligence upon its part.

Mr. Wallace, assistant manager of the United Artists Downtown theater, was called by the defendant and in his testimony described his examination of the seats in the lower half of the center section of the theater on the day in question. [Tr. p. 111]. This inspection consisted of walking through the aisles rapidly raising and lowering

each seat by hand as he went. [Tr. p. 114]. This motion was demonstrated to the trial court by the witness, Mr. Arroyo, another defense witness and a janitor employed by appellant, testified that he cleaned under the seats every night and if the seats were down he raised them. No work was done in cleaning the seat itself, or any inspection made. [Tr. p. 124].

Mr. Cudd stated that in his work as a janitor, he cleaned out between the seats and underneath the seats, raised the seats and left them until the next day. [Tr. p. 139]. It may be rather difficult, reading from the cold record, to determine how cursory and ineffectual was this inspection. It should be kept in mind that the trial court had these witnesses before it and had the benefit of observing the demonstration of their acts. Even so we submit that the testimony does not establish any actual inspection or examination of the working parts of the seat in the theater at all.

With reference to the actual cause of the collapse, appellant called Mr. Cheney, an expert metallurgist, who testified in his opinion, the seat collapsed because it was submitted to a greater load than the metal was designed to withstand. [Tr. p. 128]. It is to be remembered that appellee was at the time of the accident a woman weighing 285 pounds. Appellant accepted her admission fee with full knowledge of her size, as it was obvious. No warning of any kind was given her by appellant of any danger to herself arising from the inability of the seats in the theater to stand her weight.

If it is to be concluded from the evidence that plaintiff was too heavy for the seat, then appellant bore the duty of warning her of the danger and failure to do so constituted negligence.

The trial court, having determined the issue of negligence against appellant, on sufficient evidence, the specification of error was without merit.

4. Appellant as the Agent in Full Control of the Theater is Liable.

It is stated on page 42 of the Opening Brief that the trial court must have concluded from the contract that Appellant was a co-proprietor and was engaged in the Fox U.A. Venture as a partner. This statement is entirely without foundation and the discussion with relation to corporations becoming partners has no bearing upon the issues of this litigation. Of course, plaintiff cannot predicate her cause of action upon the contract. She may and does rely upon the contract, however, as a matter of evidence to prove that appellant was in exclusive control of the theater at the time of the accident.

We come now to the argument of appellant that as manager of the theater it cannot be held liable upon the authority of *Thurman vs. The Ice Palace,* 36 Cal. App. (2d) 364; 97 Pac. (2d) p. 999. It is to be noted from a reading of the case cited that there is nothing said therein as to the duties of Mr. Eddy, graduate manager of the Associated Student Body, either in general or with particular reference to the hockey game under discussion. From the statement in the opinion it would appear that he had nothing to do with the hockey game whatsoever. Very definitely Mr. Eddy was not selected by the Ice Palace and the student body as their agent to manage the rink and the hockey game. Clearly the case is not in point

and the statement in the brief that Mr. Eddy bore the same relation to the organization as did the appellant here is in no wise borne out by the opinion. In fact the contrary appears. The appellant, Fox West Coast Agency clearly was the agent designated to operate and maintain the theater and as such had sole control of the equipment therein.

The position of appellant, as established by the evidence, is strikingly similar to that of the appellant corporation in the case of *Mollino vs. Ogden & Clarkson Corporation, et al,* 243 N.Y. 450, 154 N.E. 307, 49 A.L.R. 518.

In that case the defendant corporation, under the terms of a written agreement, was placed in sole and absolute control of a certain building as to its sale, lease and management, including its improvement and repair. Because of the negligence in effecting necessary repairs a chimney fell into the street causing injuries to the plaintiffs. The Court said:

> "Ogden & Clarkson Corporation was more than an ordinary broker to sell or lease real estate. This, it is true, was a part of its duty, but, under the agreement, it was obligated to perform the additional duty of keeping the property in repair. The corporation had possession of the building and had stipulated, under the agreement to make the necessary repairs."

See also:

McCourtie vs. Bayton, et al, 294 Pac. 238 (Wash.)
See numbered paragraphs 5, and 6, p. 240.

II.

The Trial Court Did Not Err in Admitting into Evidence the Complaint and Answer in a Prior Action Between the Parties.

The trial court admitted in evidence plaintiff's complaint and appellant's answer filed in a previous action in the State Superior Court, involving the same accident at issue here. These documents appear as plaintiff's exhibits. Nos. 6 and 7. Objections were made to the admission of these documents and overruled.

The objections are set forth in appellant's first specification of error beginning on page 8 of the opening brief and copies of the documents are likewise set forth commencing on page 14 of Appellant's Opening Brief. These pleadings were admitted to show an admission against interest made by appellant, to-wit: that it was operating the theater. The only purpose of admitting the documents in their entirety was to establish the identity of the issues involved in the previous superior court case and the instant action. The complaint was not admitted as proof of the truth of any of the allegations contained therein, except as such allegations were admitted by the answer. Paragraph IV of the complaint being plaintiff's Exhibit No. 6, alleged that the defendants, and each of them operated and maintained the United Artists Theater. The opening portion of Paragraph V of said complaint alleging that on the 24th day of March, 1940, plaintiff paid an admission to the theater to the defendants. Paragraph IV and so much of paragraph V as indicated, was not denied

in the answer, which is plaintiff's Exhibit 7. The balance of Paragraph V, beginning with the language, "that plaintiff was shown to a seat in said theater" was specifically denied by Paragraph II of the answer, which was plaintiff's Exhibit 7.

Clearly there is no reason why an admission against interest contained in pleadings cannot be admitted in evidence the same as admissions made in any other type of document. Appellant has cited no authority substantiating its position that such pleadings are not admissible and we believe that it cannot.

With respect to that part of the argument which points out that there was no date set forth in Paragraph IV of the complaint, we submit goes to the weight of the evidence and not as to its admissibility. Particularly is this true, when it is noted that appellant admitted, by a failure to deny, that plaintiff paid to defendant an admission to the theater on the 24th day of March, 1940, to view a motion picture offered by appellant (and other defendants.)

The statement is made by appellant that the trial court attached the utmost importance to this evidence. It is true that counsel for appellant and the court engaged in a long discussion as to whether or not the exhibits were admissible, but certainly there is nothing in this situation from which it may be determined how much importance the trial court attached to the exhibits after they had been admitted in evidence and in determining the issue. Moreover, we submit that the ruling of the court admitting the exhibits in evidence was unquestionably correct.

III.

The Trial Court Did Not Err in the Admission of Evidence of Statements of the Officer of Appellant Corporation Who Verified the Answer Nor in the Admission of Any of His Testimony.

Appellant complains of the admission of testimony relative to statements made by Mr. Bertero, Assistant Secretary of the Appellant Corporation, who verified the answer in behalf of the corporation in the instant case.

The argument is made that Mr. Bertero had no authority to bind the corporation by his statements in relation to material facts involved in the determination of this litigation. With reference to the question of authority it appears that Mr. Bertero was selected by the corporation to verify the answer in its behalf, as well as the answer in the previous superior court case. By doing so, can it be said that the corporation had not authorized Mr. Bertero to speak for it with reference to the facts involved in the litigation itself? It was he who was chosen to swear to the truth of the denials, admissions and allegations contained in these answers. It was Mr. Gallagher's position that Mr. Rountree and Mr. Bertero were not discussing any business transaction in which the appellant was interested. Certainly the appellant at the time of the conversation was very much interested in the litigation then pending between appellant and appellee and it was this very litigation and certain material facts involved in this litigation which was the subject of the testimony.

Were appellant's position to be accepted in this instance, then it would be impossible for a corporation to be bound by any statement of its executive officers with relation to any material fact involved in litigation. If Mr. Bertero

had not verified the answer, appellant's argument might be sound in the absence of proof of specific authority to discuss the litigation, or that it came within the specific duties of Mr. Bertero. Surely when a corporation selects an officer to verify a pleading, it may not thereafter deny the authority to speak with reference to the material facts referred to in such pleading.

Appellant makes very little point with reference to Mr. Bertero's testimony. There is no specific answer or answers pointed out, nor is it pointed out how any answer attempted to vary the terms of the written contract, which was plaintiff's Exhibit 5. In so far as any conclusions are concerned, Appellant could not be harmed because the witness testified in detail as to his duties and to the extent of his knowledge.

IV.

The Appellant Was Not Prejudiced with Reference to the Finding of Fact in Regard to the Defense of Contributory Negligence and the Finding that Appellee Was Not Negligent Was Supported by the Evidence.

Appellant complains of the findings relating to the defense of contributory negligence stating that disregarding the adjectives "negligently" and "carelessly," there are findings which necessarily result in the conclusion that plaintiff was guilty of contributory negligence. Appellant relies on the case of *Mardesich v. C. J. Hendry Co.,* 51 A.C.A. 782; 125 Pac (2d) 596 for its position on this point. We believe that a comparison of the findings of fact in the cited case and those now before the court will demonstrate that appellant's position is not well taken and that the opinion cited is not in point. In the opinion

of the court in the *Mardesich* case, the court inserted this subhead, "Incomplete findings conjunctive in form will not support judgment." This heading fully describes the discussion which follows. The paragraph of the opinion under the heading quotes from the findings at length, such findings stating it to be true that plaintiff did not negligently and carelessly do various acts. In other places the conjunctive "and" was used with reference to two or more acts. Likewise it is pointed out in the next paragraph of the opinion that certain of the affirmative allegations of the answer as to contributory negligence were not met by the findings at all. In contrast the finding now before the court, particularly Paragraphs IX and X, commencing on page 143 of the transcript uses the disjunctive "or" throughout and in said Paragraph IX, and likewise Paragraph X which appears on page 145 of the Transcript all of the allegations of the answer in this regard are specifically met by appropriate findings.

It is to be noted that appellant makes the general statement, "There are findings of probative facts which necessarily result in the conclusion that plaintiff was guilty of contributory negligence." However, these facts are not pointed out at all. However, considering the pleading of contributory negligence, and the finding with reference thereto, we must presume that appellant contends that plaintiff was necessarily guilty of contributory negligence because she sat down in the theater seat in a normal manner without having made a careful inspection or taken some other steps to determine that the seat would support her weight.

The trial court in Paragraph X of the finding specifically found against this proposition.

In Paragraph IX, the court found it not to be true that plaintiff spread, or strained, or misused this seat, or that she failed to control her body, or forced her body into the seat. Appellant's position in this regard is not well taken. Certainly having paid an admission to Appellant, plaintiff was entitled to rely upon Appellant furnishing her with a reasonably safe place to sit to view the motion picture. There is no argument that plaintiff's weight and size is greater than the average adult person, but on the other hand it is certainly not uncommon, which is a matter of common knowledge. There are many persons of equivalent or greater size or weight who attend theaters and like performances.

Appellant makes the statement that the testimony of the expert Cheney is conclusive proof that plaintiff misused the seat. The opinions of this witness are in no wise proof of any such thing. If there was any evidence in the record at all to show that plaintiff dropped her weight suddenly upon the seat, or used some degree of physical force to get into the seat, there might be some justification for Appellant's position. Plaintiff testified that she lowered the seat and sat down [Tr. p. 13]. Under cross-examination she stated that she lowered the seat at which time she was in a position facing at right angle to the screen and then turned to face the front of the theater and sat down [Tr. p. 16] "and in lowering myself into the seat my hips would come in contact with the arms." [Tr. p. 18.] Certainly this testimony does not show any misuse of the seat or the use of any physical force to get into the seat. Specifically, there is no evidence upon which an affirmative finding could be based to the effect that plaintiff permitted her body to come into unusual or severe

contact with the parts of the seat, or cause the seat to be subjected to an extreme or unusual stress or strain, or that she forced a portion of her body between the arms of the seat, or that she used the arms of the seat for a purpose for which they were not designed, or that she forced her body into the space existing between the arms of said seat, or that she exerted a great or unusual force sideways against each arm of the seat.

We submit that the finding with relation to the defense of contributory negligence was entirely proper.

With reference to the argument that the allegations of contributory negligence set forth in the answer admitted in evidence as plaintiff's Exhibit 7 not being denied, constituted proof of such contributory negligence, is wholly without merit. Under the rules of pleading in the state of California, the affirmative allegations of an answer are deemed denied. Consequently the admission in evidence of this answer which was admitted for an entirely different purpose, as previously shown herein, was no proof whatsoever of the truth of any of the facts alleged as an affirmative defense.

Conclusion

It is respectfully submitted that the record being free from error, and the judgment being supported by the evidence, the judgment of the District Court should be affirmed.

ROSECRANS & EMME and
BAYARD R. ROUNTREE,
Attorneys for Appellee.